No. 80-6169

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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WILLIS F. STREATER, PETITIONER

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT OF COLUMBIA
COURT OF APPEALS

MOTION BY THE UNITED STATES TO DISMISS

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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WILLIS F. STREATER, PETITIONER

v.

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ON APPEAL FROM THE DISTRICT OF COLUMBIA
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MOTION FOR THE UNITED STATES TO DISMISS

Appellant claims that he was denied effective assistance of counsel on appeal when the appellate court permitted his attorney to withdraw and affirmed his conviction based on its review of the record.

After a jury trial in the Superior Court of the District of Columbia, appellant was convicted of robbery, in violation of D.C. Code §22-2901. He was sentenced to a term of 5 to 15 years' imprisonment. The District of Columbia Court of Appeals affirmed. Appellant then filed a motion in the Superior Court to vacate his sentence pursuant to D.C. Code §23-110, the District of Columbia analogue of 28 U.S.C. 2255. That motion was denied and the court of appeals affirmed (J.S. App. 1-2).

1. Appellant's trial counsel was appointed under the Criminal Justice Act to represent him on appeal. Subsequently, counsel filed a formal motion to withdraw in which he represented that no non-frivolous issue was presented by the appeal. That motion, five pages in length, summarized the evidence, set out various legal considerations, and expressed counsel's legal conclusions. In the motion counsel stated that he had consulted with appellant on several occasions regarding his inability to find any non-frivolous issues and had also discussed the matter with counsel for appellant's co-defendant.[1/] Nine months after the motion to withdraw was filed, the court of appeals also concluded -- after reviewing the motion, the record on appeal, and the trial transcript -- that no non-frivolous issue was presented. Accordingly, it granted counsel's motion to withdraw and affirmed appellant's conviction.

Appellant thereafter filed a motion to vacate his sentence pursuant to D.C. Code §23-110, asserting that his counsel's motion to withdraw on appeal failed to meet the standards of effective representation set forth in Anders v. California, 386 U.S. 738 (1967). In a written opinion, a copy of which is appended hereto, the Superior Court denied the motion, finding that the Anders standards were fully met (App., infra, 1-4). On appeal from that denial, the court of appeals did not consider the Anders question, but instead affirmed the judgment on the ground that appellant's claim is not cognizable under D.C. Code §23-110 because that statute provides no basis for trial court review of appellate proceedings (J.S. App. 2).

1/ The co-defendant's counsel concurred in the evaluation that the appeal did not present any non-frivolous issues.

2. Appellant erroneously asserts (J.S. 2) that jurisdiction for this appeal rests on 28 U.S.C.. 1257(2). Section 1257 sets forth the procedures for review by this Court of final judgments or decrees rendered by the "highest court of a State" and provides that that term shall include the District of Columbia Court of Appeals. Subsection 2 provides that review shall be by appeal "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." It is not clear from the Jurisdictional Statement whether appellant seeks review of his underlying claim of ineffective assistance of counsel on appeal or limits his challenge to the appellate court's judgment that the claim is not cognizable under D.C. Code §23-110. If the former, quite plainly the only avenue for review is a writ of certiorari under 28 U.S.C. 1257(3). In any event, even if the constitutionality of the District of Columbia's post-conviction relief statute was drawn in question in the lower court, D.C. Code §23-110 is simply not a "state statute" such that a decision upholding it against a federal challenge gives rise to a direct appeal. Palmore v. United States, 411 U.S. 389, 394-396 (1973).

3. Nor is there a basis for certiorari review in this case. The court of appeals correctly held that appellant's claim is not cognizable under D.C. Code §23-110. That statute provides, as does 28 U.S.C. 2255 in substantially identical terms, for a collateral attack on asserted infirmities in the imposition of sentence. All circuits to have considered the

issue have held that the federal statute does not authorize collateral attack at the trial court level upon alleged errors in appellate proceedings. Powers v. United States, 316 F.2d 223, 224 (10th Cir.), cert. denied, 375 U.S. 858 (1963); Williams v. United States, 307 F.2d 366, 368 (9th Cir. 1962); Rivera v. United States, 477 F.2d 927, 928 (3d Cir. 1973); Berube v. United States, 355 F.2d 543, 544 (5th Cir. 1966); see also Quinn v. United States, 500 F.2d 387 (5th Cir. 1974). The remedy, when such an infirmity is asserted, is a motion to the appellate court to recall its mandate and reinstate the appeal. Williams v. United States, supra; Rivera v. United States, supra; see also Quinn v. United States, supra. The same rule logically applies to the cognate District of Columbia statute.[2/] Under both statutory schemes, the proper remedy avoids the incongruity of asking an inferior court to sit in judgment on proceedings in an appellate court. Rivera v. United States, supra.[3/]

2/ Since a remedy was available to appellant, there is no merit to his assertion (J.S. 2) that the court of appeals effectively held "that there is no method whereby the issue of ineffective appellate counsel can be raised."

3/ Although we do not believe that the Superior Court had jurisdiction to consider the issue, we agree with its reasoning (App., infra, 2-4) that the steps taken by both the withdrawing counsel and the court of appeals satisfied the constitutional requirements enunciated in Anders v. California, supra, 386 U.S. at 744-745.

It is therefore respectfully submitted that the appeal should be dismissed. Treating the appeal as a petition for a writ of certiorari, it is respectfully submitted that the petition should be denied.

WADE H. McCREE, JR.
Solicitor General

MARCH 1981

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

FILED

UNITED STATES OF AMERICA :

v. : Criminal No.

WILLIS F. STREATER :

OPINION AND ORDER

Willis F. Streater, defendant herein, contending that he was denied effective assistance of counsel in prosecuting the appeal of his case before the District of Columbia Court of Appeals, moves to vacate the sentence imposed and to be re-sentenced pursuant to District of Columbia Code 1973 §23-110.

On December 27, 1978, defendant filed a pro se motion, together with points and authorities and an affidavit, for post-conviction relief. His request for court-appointed counsel was granted and counsel filed a supplemental motion to vacate sentence on April 20, 1979.

An opposition was filed by the Government on February 23, 1979. Thereafter, a hearing was held on the motion on May 24, 1979.

It is the position of defendant that he was denied effective assistance of counsel in that appellate counsel failed to file either an appeal brief in his behalf or to file a brief meeting the minimum standards set forth in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). Defendant argues that although appellate counsel filed a motion to withdraw purporting to follow the criteria outlined in Anders, supra, such motion was deficient in that it failed to set out the points which defendant sought to assert and to cite cases bearing on these issues. The motion, defendant asserts, is no more than the "no-merit letter" proscribed by Anders. Further, defendant maintains that he was not accorded adequate time to file a pro se brief nor was he kept advised by appellate counsel of the progress of the case in the Court of Appeals.

The Government not only opposed the motion but also urged that the petition be denied without a hearing. The position of the Government is that this case is clearly distinguishable from Anders and that the records conclusively reflect that appellate counsel fully and professionally discharged his duty to his client and that his representation was constitutionally effective.

A brief history of the case appears warranted. Defendant was indicted in June 1976 on charges of armed robbery, robbery, and assault with a dangerous weapon. On July 29, 1976, a jury returned a verdict of guilty on the robbery count and verdicts of not guilty on the other counts. Defendant was sentenced to a period of imprisonment of not less than five nor more than fifteen years on November 2, 1976. A notice of appeal was timely filed on November 11, 1976, by trial counsel who had been retained. Trial counsel was thereafter appointed as appellate counsel under the Criminal Justice Act.

On November 14, 1977, appellate counsel filed a formal motion to withdraw representing to the court that, in his opinion, no nonfrivolous issue was presented. Thereafter, the Court of Appeals issued the following judgment on August 15, 1978:

> This cause came on for consideration on the motion of counsel to withdraw and the Court, having reviewed the motion and the record on appeal containing the reporter's transcript of the proceedings in the trial court and being of the view this case presented no nonfrivolous issue, it is
>
> ORDERED that the motion be granted, and it is
>
> FURTHER ORDERED and ADJUDGED that the judgment of conviction on appeal is affirmed.

Defendant's reliance on Anders, supra, is misplaced. Counsel filed a formal motion setting out, among other things, a statement of facts, his legal consideration accorded the issues, and a legal conclusion. Moreover, counsel was not limited to just the cold record - he had not only served as trial counsel but also consulted with defendant and

counsel for the co-defendant.[1] Defendant maintains that the motion does not set out the points nor cites cases which he chose to assert. Anders does not hold that counsel must delineate defendant's list of alleged errors. Interestingly, at the hearing hereon defendant enumerated six arguable issues. In his pro se motion he mentioned two: (1) witness testimony did not corroborate and (2) court erred in admitting gun as evidence over objection. The defendant had been found not guilty on both counts relating to the weapon - hardly an arguable issue on appeal; counsel noted the appeal on sufficiency of the evidence - this could surely include defendant's theory of failure of corroboration of witness testimony. Should Anders require such, this Court finds the motion was not deficient.

The formal motion in this case cannot be compared with the letter in Anders. There, counsel made a bold assertion that there was no merit to the appeal and that he would not file a brief. Moreover, the appellate court there reviewed the record and affirmed the judgment but failed to note its assessment of the record. Here, counsel found the appeal to be wholly frivolous without an arguable issue after a conscientious review of the entire transcript and consultation with defendant. The Court finds that the motion to withdraw was active advocacy as opposed to an impartial evaluation. Appellate counsel's conduct and product far exceeded that of a friend of the court. It is also found that defendant received effective assistance in counsel's search for nonfrivolous issues.

Even more important to the resolution of this issue is the judgment of the Court of Appeals. In order to fulfill its responsibility on motions of counsel for leave to withdraw from representation of a defendant on appeal, the court must conclude, as it did here, that counsel

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[1] Co-defendant Jacob Brooks also noted an appeal. Upon motion to withdraw by his appellate counsel, said motion was granted and the appeal dismissed on September 1, 1977, as there were no nonfrivolous issues presented.

has made a conscientious investigation of the case and agree with counsel's evaluation of the appeal that it contains no nonfrivolous issues. Defendant does not specifically assert that the court failed in its responsibilities but does assert that the deficiency of the motion to withdraw impacts upon its final judgment. Having found that the formal motion does meet constitutional muster, the Court concludes that the Court of Appeals was able to provide full consideration and resolution of the issues as there was indeed an advocate.

For the foregoing reasons, which constitute the Court's findings of fact and conclusions of law, the motion of defendant to vacate sentence pursuant to 23 D.C. Code 110 must be denied.

WHEREFORE, it is this 6th day of August, 1979,

ORDERED that the motion of defendant to vacate sentence be and hereby is, DENIED.

NORMA HOLLOWAY JOHNSON
Judge

Copies to:

Martin J. Callaghan, Esq.

Mark J. Biros
Assistant United States Attorney

Charles F. Stow, III, Esq.